INDEX

	Page
Introduction	1
Opinions below	2
Questions Presented	2
Argument	3
Conclusion	17

TABLE OF CASES

Page

Alaska S. S. Co. v. Petterson
(1954) 347 U.S. 396, 74 S.Ct. 601 7

Alexander v. Bethelem Steel Corp.
(2nd Cir. 1967) 382 F. 2d 963 3

Antoine v. Lake Charles Stevedores
(5th Cir. 1967) 376 F. 2d 443 15

Arista Cia. de Vapores S.A. v. Howard Terminal
(9th Cir. 1967) 372 F. 2d 152 5

Benton v. United States Lines, Inc.
(D.Md. 1968) 297 F. Supp. 87, aff'd. 408
F. 2d 378 (4th Cir. 1969) 14

Calbeck v. Travelers Insurance Co.,
(1962) 370 U.S. 114, 82 S.Ct. 1196 16

Candiano v. Moore-McCormack Lines, Inc.
(2nd Cir. 1967) 382 F. 2d 961 ..... 3, 12, 16

Cleary v. United States Lines Co.
(2nd Cir. 1969) 411 F. 2d 1009 13

Crumady v. The *Joachim Hendrik Fisser*
(1959) 358 U.S. 423, 79 S. Ct. 445 7

Duncan v. Transeastern Shipping Corp.
(5th Cir. 1969) 413 F. 2d 1023 15

Grigsby v. Coastal Marine Service of Texas, Inc.
(5th Cir. 1969) 412 F. 2d 1011 1

Grillea v. United States
(2nd Cir. 1956) 232 F. 2d 919 11

TABLE OF CASES (Continued)

Page

Grimes v. Raymond Concrete Pile Co.
(1958) 356 U.S. 252, 78 S.Ct. 687 16

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co. (1964) 376 U.S. 315, 84 S.Ct. 748 .. 16

Luckenbach Overseas Corporation v. Usner
(5th Cir. 1969) 413 F. 2d 984 3

Mascuilli v. United States
(1967) 387 U.S. 237, 87 S. Ct. 1705 2

Massa v. C. A. Venezuelan Navigacion
(2nd Cir. 1961) 332 F. 2d 779 5

Mitchell v. Trawler Racer, Inc.
(1967) 362 U. S. 539, 80 S. Ct. 926 8

Morales v. City of Galveston
(5th Cir.) 275 F. 2d 191, vacated and remanded, 364 U. S. 295, 81 S. Ct. 107 (1960); on remand, 291 F. 2d 97, aff'd. 370 U.S. 165, 82 S. Ct. 1226 (1962) 7

Reed v. *s.s.* YAKA
(1963) 373 U.S. 410, 83 S. Ct. 1349 4

Ryan Stevedoring v. Pan Atlantic S.S. Corp.
(1956) 350 U.S. 124, 76 S. Ct. 232 4

Seas Shipping Co. v. Sieracki
(1946) 328 U.S. 85, 66 S. Ct. 872 ..... 4, 5

Tarabocchia v. Zim Israel Navigation Co., Ltd.
(2nd Cir. 1969) 417 F. 2d 476 ..... 2, 10, 13, 14

TABLE OF CASES (Continued)

Page

Tim v. American President Lines, Ltd.
(9th Cir. 1969) 409 F. 2d 384 ..... 3, 9

Venable v. A/S Det Forende Dampskibsselskab
(4th Cir. 1968) 399 F. 2d 347 ..... 3, 6

Waldron v. Moore-McCormack Lines, Inc.
(1967) 386 U. S. 724, 87 S. Ct. 1410 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 675

JOSEPH CHARLES USNER

VS.

LUCKENBACH OVERSEAS CORPORATION AND ISTHMIAN LINES, INC.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This response to the application for the writ of certiorari is made pursuant to the direction of the Court. For the reasons hereinafter set forth, respondent submits that the writ should be refused, but earnestly and with respect urges, if the Court is of the opinion that the position of petitioner has merit, that such opinion be finalized only after the writ has been granted and oral argument has been heard.

Counsel is advised that the principle of law here involved is of transcendent importance to the maritime industry and that *amici curiae* briefs may be expected

from several sources. The "cryptic deliverance"[1] of the Court in *Mascuilli*[2] has undoubtedly led to confusion in the lower courts,[3] and another *per curiam* reversal contemporaneously with the granting of the writ will serve only to compound the confusion now existing in the minds of the judges of the various Districts and Circuits.

Petitioner here seeks a change in the rules of the game; and although it is our submission that no change should be made, with the utmost respect we urge that if Your Honors decide the case in favor of the position taken by petitioner, your decision be clear-cut, so that the industry will know where it stands.

OPINIONS BELOW

Since the filing of the application, the opinion below has been reported officially in 413 F. 2d. 984. Likewise, the opinion in *Grigsby et al v. Coastal Marine Service of Texas, Inc., et al* is reported officially in 412 F. 2d. 1011.

QUESTIONS PRESENTED

A single question is presented for review on the record herein. That question is posed by the Court below as follows:

> "The sole issue is whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, this negligence resulting in the injury of another stevedore, when all the equipment and appurtenances aboard the

---

[1] Brown, J. in Grigsby v. Coastal Marine Service of Texas, Inc. 412 F.2d 1011, 1033 (5th Cir. 1969); see also Moore, J. in Tarabocchia v. Zim Israel Navigation Co., Ltd. 417 F. 2d 476, 477 (2nd Cir. 1969).

[2] Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705 (1967).

[3] See pp. 11-15, infra.

ship are admittedly in a seaworthy condition."[4]

The foregoing question, we submit, is considerably more narrow than that presented as Question (2) in the petition. Questions (1) and (3), purported raised below, are subsidiary thereto and do not necessarily follow therefrom.

ARGUMENT

As the Court of Appeals pointed out in the course of its opinion, the facts in this case are undisputed[5] and generally are set forth properly in the application for the writ. Although it may be possible to reconcile the decisions of the various Circuits on their narrow facts, it is submitted that counsel would be less than frank if it were argued that there is unanimity among the Circuits in the general area of negligence and unseaworthiness. *Candiano*[6] and *Alexander*[7] in the Second Circuit and possibly *Venable*[8] in the Fourth Circuit cannot be reconciled in theory with *Tim*[9] in the Ninth Circuit and the Fifth Circuit opinions, including the opinion below in the instant case.

The conflict between the Circuits, however, is not in the original thought processes of the Judges in every day contact with these types of cases and who decide them in the courts of first instance, but in the appreciation of the lower courts of the meaning of the decision of Your

[4] Opinion below, 413 F. 2d 984, 985.

[5] The case was tried on a stipulation of fact which is summarized in the opinion below, 413 F. 2d 984, 985. It is believed that the summary is accurate in all respects.

[6] Candiano v. Moore-McCormack Lines, Inc. 382 F. 2d 961 rehearing den. 386 F. 2d 444 (2nd Cir. 1967).

[7] Alexander v. Bethlehem Steel Corp., 382 F. 2d 963 (2nd Cir. 1967).

[8] Venable v. A/S Det Forenede Dampskibsselskab, 399 F. 2d 347 (4th Cir. 1968).

[9] Tim v. American President Lines, Ltd., 409 F. 2d 385 (9th Cir. 1969).

Honors in *Mascuilli*. The stage for that decision was set by a long series of cases wherein the courts generally, and this Court in particular, accorded to the Longshoremen's and Harbor Workers' Compensation Act an extremely liberal interpretation in favor of an injured maritime worker. The language of that Act, in the context of this case, has not been amended by the Congress since the date of its original enactment, although its penumbra of case law has changed so materially as to make the entire area unrecognizable. It had been thought that *Sieracki*,[10] *Ryan*,[11] and *Yaka*[12] completed the circle which seemingly had an outer perimeter bounded only by the ingenuity of plaintiffs' counsel. Yet all of the foregoing has taken place in the face of the provision of the law describing the statutory remedy of a longshoreman against his employer as "exclusive".

Although counsel knows of no accurate source of statistics which are available to show the number of Federally compensable injuries which result in a suit against the shipowner wherein the stevedore-employer in fact foots the bill, counsel's personal experience, at least in the New Orleans area from which this case arises, is that the "circular liability" spawned by *Ryan* and *Yaka* comes to rest on the stevedore contractor in the vast majority of such cases. It is believed that the heavy dockets of the District Courts in the Ports of the country are conclusive proof of the extraordinary increase of litigation in this field directly attributable to that "circular liability", which, we submit, was never legislated by Congress and

---

[10] Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872 (1946).

[11] Ryan Stevedoring Co. v. Pan Atlantic SS Corp., 350 U. S. 124, 76 S. Ct.232 (1956).

[12] Reed v. SS *Yaka*, 373 U.S. 410, 83 S. Ct. 1349 (1963).

which foists liability for the "bonus recovery"[13] of the injured longshoreman on his employer in the face of a schedule of benefits for specific injuries which has been reviewed on at least two occasions by the Congress and materially increased on each review.[14]

To compound the unfortunate situation in which the stevedore contractor finds itself today, the rule now seems to be that in addition to making good any judgment which might be rendered against a shipowner by virtue of the application of the doctrine that the stevedore has failed to carry out his contract in a workmanlike fashion or that the conduct of the stevedore "brought into play" the pre-existing unseaworthiness of the ship, the stevedore contractor must also pay the expenses and attorney's fees of the shipowner who is proceeded against by an injured longshoreman in a baseless suit which the shipowner is successful in defending.[15]

It may be that Your Honors will say that the rules referred to are now so firmly imbedded in our jurisprudence as to preclude further argument on their propriety, but it is submitted that the instant case presents an additional liability theory far over and beyond any heretofore approved by this Court. We respectfully urge that the door of open end liability on the shipowner/stevedore not be closed so as to eliminate the single remaining ground

---

[13] Cf. Frankfurter, J., dissenting in Sieracki, supra, n. 10.

[14] The original 1927 Act providing for a maximum weekly payment for death of $52.50 was amended in 1956 to increase the maximum to $81 per week and was again amended in 1961 to increase the rate to the present $105 maximum. The disability compensation, originally fixed at $35 per week was raised to $54 in 1956 and to $70 in 1961. Other liberalizations in benefits were consistent with the foregoing. The benefits of the Federal Act are far greater than those accorded a workman under any state law.

[15] Cf. Massa v. C. A. Venezuelan Navigacion, 332 F. 2d 779 (2nd Cir. 1964; Arista Cia. De Vapores, S. A. v. Howard Terminal, 372 F. 2d 152 (9th Cir. 1967).

upon which a personal injury claim of a longshoreman may be defended, thereby requiring the shipowner/stevedore to do exactly what this Court and many other courts have said need not be done: a shipowner has never been required to furnish an accident-free ship and the courts have consistently recognized that it would be improper to place such an obligation on him.

It is to be noted that we do not plead that the stevedore contractor should escape liability. The Longshoremen's and Harbor Workers' Compensation Act forecloses any such plea. The stevedoring industry, like any other industry, and regardless of fault, must pay an injured employee the amount of compensation found to be due — carrying the burden of an unlimited medical expense and a lifelong compensation payment if the circumstances justify such an award.

Against the foregoing background, an attempt is made in the instant case to have Your Honors hold that the instantaneous negligence of a longshoreman resulting in the injury of a fellow worker renders an otherwise admittedly seaworthy ship unseaworthy, and may serve as the basis for a recovery for which, as surely as night follows day, the stevedore contractor will be required to pay.

The illustration cited by Judge Bryan in his dissent in *Venable*[16] is singularly apposite and may be applied to a lunch pail as well as to a hammer, wrench or other tool. Petitioner would have this Court hold that a vessel becomes unseaworthy if a longshoreman walking along the deck with his dinner pail accidently drops the pail on

[16] Supra, n. 8, at 354.

the foot of a fellow worker walking beside him and causes a broken toe. Applying the "but for" rule of elementary tort law, an answer might be made in the light of present conditions that the fellow worker should have been furnished with safety shoes which would have precluded injury. But what answer may be made if the pail were dropped on the fellow worker's hand rather than on his foot? We submit that such negligence, although leading to the payment of compensation under the Act, cannot in theory or in fact create an unseaworthy condition.

We should point out that we are not here concerned with an unseaworthy condition created by the negligence of a longshoreman,[17] or with defective gear brought on board by the stevedoring contractor,[18] or with an improper method of loading,[19] or with an insufficient number of men being assigned to perform a job.[20] We are here concerned solely with an attempt to extend the doctrine of damages being awarded for unseaworthiness caused by the instantaneous negligence of a longshoreman where no faulty "condition" preexisted the injury.

The contention may be made that the doctrine of recovery for negligence is subsumed by the doctrine of recovery for unseaworthiness. That approach, however, does not meet the question here presented and the basic fallacy of such a position can easily be pointed out by an analysis

---

[17] Crumady v. The *Joachim Hendrik Fisser*, 358 U. S. 423, 79 S. Ct. 445 (1959).

[18] Alaska SS Co. v. Petterson, 347 U. S. 396, 74 S. Ct. 601 (1951).

[19] Morales v. City of Galveston, 275 F. 2d 191 (5th Cir.), vacated and remanded 364 U. S. 295, 81 S. Ct. 107 (1960); on remand, 291 F. 2d 97, aff'd. 370 U. S. 165, 82 S. Ct. 1226 (1962).

[20] Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 87 S. Ct. 1410 (1967).

of the holding of the Court in *Trawler Racer*,[21] which decision is generally recognized as the keystone on which the modern concept of unseaworthiness has been built by this Court. Your Honors there rejected the contention that transitory unseaworthiness is limited by concepts of common law negligence, but you have nevertheless presupposed the existence of a faulty or unseaworthy condition, although such condition was temporary in nature, saying:

> "There is no suggestion in any of the decisions that the duty is less onerous with respect to an *unseaworthy condition* arising after the vessel leaves her home port, or that the duty is any less with respect to an *unseaworthy condition which may be only temporary*. Of particular relevance here is Alaska Steamship Co. v. Petterson, supra. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had on control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the *unseaworthy condition* is not essential to his liability. That decision also effectively disposes of the suggestion that liability for a *temporary unseaworthy condition* is different from the liability that attaches when the *condition* is permament.
>
> "There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed.

[21] Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926 (1960).

> Such theories might be made to fill a volume of logic. *But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.*
>
> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin v. Lykes Bros. S. S. Co., 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354." (Italics ours).

Nowhere in any decision that Your Honors have announced has there been a suggestion that the basic prerequisite of the *existence* of an unseaworthy condition as a foundation of liability has been abandoned. In *Morales*, *supra*, this Court held that an unsafe condition in cargo being loaded aboard a ship did not *per se* render the vessel unseaworthy, although it is acknowledged, of course, that the dissent there did indicate that liability should be imposed because the vessel was not reasonably fit in view of the shipowner's prior knowledge of the possibility that the fumigation of the grain could cause personal injury to those working in proximity to it. The condition, however, existed at all times, so that even if the dissent there were to become the law of tomorrow the holding

could quite easily be reconciled with today's jurisprudence.

Likewise, in *Waldron, supra*, the insufficiency of the manual assistance afforded to the injured plaintiff constituted the basis for the claim of unseaworthiness, but again Your Honors had before you an existing condition which gave rise to the injury. In each of the cases which have heretofore been described as constituting the successive high water marks in the determination of unseaworthiness, the existence of some condition will be found on which the Court predicated liability.

The foregoing, of course, is consonant with the concept that unseaworthiness is condition and that negligence is causation. The one does not mean the other. Two completely separate and different doctrines are involved, and we respectfully submit that those who claim that negligence is subsumed by unseaworthiness in this field simply fail to recognize the difference between the two.

Despite the suggestion by Judge Moore that the word "'unseaworthiness' may have become a term of art wholly unrelated to reality",[22] it can hardly be believed that so well defined a word, in use for so many years, can so radically change its meaning. No social condition dictates the necessity for such a change. No suggestion can be made that a change is necessary because of a concept, newly advanced, that the word has always been improperly defined.

On the contrary, the evolution of the law over the past two or three decades has left no room for equivocation: "seaworthiness" connotes condition, not causation. The

---

[22] Moore, J., in Tarabocchia, supra, n. 1, at 473.

divorce from concepts of negligence must remain finalized.

Although counsel must frankly state to the Court that the decision in *Mascuilli* does not generally seem to be understood by the bench or the bar, one does not go to Delphi for an interpretation of the Oracle's words. No one can be more familiar with the meaning of a decision than the Court which rendered it, and it would serve no useful purpose to present any argument to Your Honors as to the proper interpretation of that decision. We address ourselves, therefore, not to the meaning of the *Mascuilli per curiam*, but to the proper answer to the question presented by the application for the writ herein.

It is probable that the doctrine of operational negligence causing actionable unseaworthiness stems, in the Second Circuit at least, from the decision of that Court in *Grillea*.[23] In that case, the fact that a longshoreman had misplaced a hatch cover so as to cause it to be in a position to fall created a condition of unseaworthiness which resulted in an accident. The fact that the cover was otherwise perfect was of no moment: its misplacement created the unseaworthy condition, and even though the physical act of misplacing the cover might stem from negligence, the vessel was nevertheless unseaworthy at the time of the accident.

"Instantaneous negligence", accordingly, was not a factor in that case any more than it would be in any other case where unworkmanlike conduct in a loading or discharging operation aboard ship creates a condition which causes an injury to a longshoreman. *Candiano* likewise involved unseaworthiness. Hooks had been inserted in holes

[23] Grillea v. United States, 232 F. 2d 919 (2nd Cir. 1956).

in each end of a beam being lowered into a hold, but one of the hooks became dislodged and the beam fell, causing the injury. The fact that the hook had been negligently attached to the beam caused the ship to become unseaworthy, but again the condition of unseaworthiness was encountered by the injured longshoreman. On rehearing, Judge Moore expounded at length on his theory of the concept of operational negligence causing unseaworthiness. He pointed out that the time element is irrelevant, for practically no loading or unloading operation could be carried on in such a manner as to permit it to be said at any time that a phase of the operation had ceased and another phase had started so as to cause the negligence to be defined as instantaneous. His review of the case law points up the difficulty in which a trial court finds itself in attempting to give an instruction to a jury in a case involving operational negligence, which is one of the issues that must be faced in any attempt to reconcile doctrine with practicalities.

As Judge Moore points out, the clarity of the definition of seaworthiness given in the *Trawler Racer* "has been considerably dimmed by appellate decisions". A vessel which is reasonably fit or reasonably suitable for its intended use and service is no longer seaworthy by the definition (in this context) accorded that word by the lower courts. The definition has completely lost its significance, at least in the Second Circuit, by the confusion of unseaworthiness with negligence through what Judge Moore describes as "instantaneous alchemy".[24]

Following *Candiano* came *Alexander* (decided on the same day), where the claimed unseaworthiness stemmed

[24] Moore, J., concurring in Candiano, supra, n. 6, 386 F. 2d 444, 449.

from an improper placing of dunnage as well as from an incompetent crane operator whose negligence displaced the dunnage.

Next in the line of cases decided in the Second Circuit would seem to be *Cleary*,[25] which involved the negligently improper spotting of a boom coupled with negligent operation of the winches. The condition (improper spotting) pre-existed the negligence of the winch operator and the decision is consonant with the others in this line of cases.

The last case which counsel has been able to find in the Second Circuit following this line seems to be *Tarabocchia*,[26] where the Court held the ship liable for an accident caused by the apparent negligent handling of a sling or winch by the stevedore company's employees, causing a platform attached to the wharf to fall and injure the plaintiff. Judge Moore sat on that panel and pointed out that the Second Circuit had

> "committed itself to the proposition that operational negligence must be equated with unseaworthiness of the ship. We have thus crossed our Rubicon and if we are to retreat from our position, it must be over a bridge constructed by the Supreme Court when, as and if it may choose to resolve the apparent conflict between the Circuits. To hold that a negligent act of an employee of a stevedore can instantaneously turn a proud seaworthy ship into an unseaworthy floating object may seem to defy common sense but "unseaworthiness' may have become a term of art wholly unrelated to reality. Possibly in a semantic way we are dealing with what is 'essentially a species of liability without fault'."[27]

[25] Cleary v. United States Lines Co., 411 F. 2d 1009 (2nd. Cir. 1969).
[26] Supra, n. 1.
[27] 417 F. 2d 476, 478.

It is not hard to discern from these four opinions that the Second Circuit would never have gone so far as to hold that operational negligence constitutes unseaworthiness were it not for the fact that it interpreted *Mascuilli* as requiring that result. *Mascuilli* indeed is the forerunner of the conflict in theory between the Circuits, for despite the majority opinion in *Venable*, the ruling on the petition for rehearing shows that the Court *en banc* was of the opinion that although operational negligence might cause unseaworthiness, every such instance did not create an unseaworthy condition so as to give rise to liability.

This is made clear by the subsequent affirmance by the Fourth Circuit of Judge Harvey's memorandum opinion on the appeal taken from a motion maintaining a summary judgment in favor of the defendant in *Benton*.[28] The court below remarked that it had seen no case where an injury sustained by a wrench negligently thrown into a hatch could be classified as one caused by unseaworthiness in that there had been no condition created. Unseaworthiness, it was held, contemplates condition.

In the Ninth Circuit, the rule is the same as in the Fifth: the distinction is maintained and instantaneous negligence is held not to create unseaworthiness. In *Tim*,[29] the only complaint was the negligence of the crane operator. A long line of cases cited in the course of the opinion indicates that the Ninth Circuit has consistently refused any doctrine that unseaworthiness arises out of instantaneous negligence, the Court there pointing out

---

[28] Benton v. United States Lines, Inc., 297 F. Supp. 87 (D. Md. 1968), aff'd. 408 F. 2d 378 (4th Cir. 1969).

[29] Supra, n. 9.

that a defective condition must exist for the Court to hold a vessel unseaworthy.

The decisions of the Fifth Circuit, including the decision below, remain to be discussed. That Court apparently first decided that operational negligence does not constitute unseaworthiness in *Antoine*.[30] The *Antoine* doctrine was affirmed in *Grigsby*, and reaffirmed in *Duncan*[31] as well as in the instant case.

A tabulation of the opinions in the foregoing cases may therefore be said to reflect the reaction of a substantial majority of the Judges on the Fourth, Fifth and Ninth Circuits, and at least a large number of the Judges on the Second Circuit: the score is impressive in rejecting the concept that the existence of a pre-accident condition is not a requisite to the finding of liability based on unseaworthiness. *Absent* the *Mascuilli per curiam*, we dare say there would be a complete unanimity among all Circuits in holding that instantaneous negligence, standing alone, does not give rise to an action for damages based on unseaworthiness.

If counsel were permitted to go further in this projection, we would be inclined to state that a great majority of the judges whose dockets require them to hear most of the "circular liability" cases would stop far short of *Sieracki*, *Ryan* and *Yaka*. Most courts, we submit, would gladly return to the days when a ship, to be labelled "unseaworthy", would have to have something inherently wrong with her before she could be called not reasonably fit for cargo or men. Then, spilling coffee beans on a wharf as a result of slack bags, rigging a

[30] Antoine v. Lake Charles Stevedores, 376 F. 2d 443 (5th Cir. 1967).
[31] Duncan v. Transeastern Shipping Corp., 413 F. 2d 1023 (5th Cir. 1969).

hatch tent with new wire rope which proved defective and broke, bringing on board ship a latently defective snatch block, or any other similar type of "default" in the performance of a stevedore's duties would visit liability on him alone. That liability would be exclusive of any other. It would be based on the unambiguous provisions of the Longshoremen's and Harbor Workers' Compensation Act as enacted by the Congress, and not on any concept of the unseaworthiness of a ship which requires the shipowner to act as a buffer between the longshoreman and his employer. It must be recognized that rightly or wrongly, no system has yet been devised by the ingenuity of man which guarantees that an accident will not occur. If such a guarantee is exacted from the shipowner, he is required to do exactly what Your Honors have said is not necessary: insure an accident-free vessel.

It is submitted that at this moment in our socio-legal development, an injured maritime worker, be he longshoreman, harbor worker or seaman, probably has more rights than any other worker in industry. No social or legal need can be shown invoking policy reasons in order to "impose new financial burdens on stevedoring companies in plain violation of the policy Congress adopted in the Longshoremen's and Harbor Workers' Compensation Act."[32] On the contrary, the need is to "give effect to the law as Congress has written it",[33] and get away from characterizing the theory and rationale of judicial opinions as "instantaneous alchemy"[34] and "judicial legerdemain".[35]

---

[32] Black, J., dissenting in Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 326, 84 S.Ct. 748 (1964)

[33] Harlan, J., dissenting in Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 255, 78 S.Ct. 687 (1958)

[34] Judge Moore, supra, n.24

[35] Stewart, J., dissenting, in Calbeck v. Travelers Insurance Co., 370 U.S. 114, 132, 82 S.Ct. 1196 (1962)

CONCLUSION

We respectfully urge that if Your Honors see fit to grant the petition herein, you do so for the purpose of bringing the Second Circuit into line with the Fourth, Fifth and the Ninth, and that the Court affirm the decision below and hold that instantaneous negligence is not tantamount to unseaworthiness, a word which has always been recognized to refer to a condition pre-existing the incident giving rise to the claim.

Respectfully submitted,

CHARLES KOHLMEYER, JR.
1800 National Bank of Commerce Building
New Orleans, Louisiana 70112
Attorney for Respondent

February 6, 1970

Of Counsel:
Benjamin W. Yancey
Maurie D. Yager
Terriberry, Carroll, Yancey & Farrell
Thomas W. Thorne, Jr.
Lemle, Kelleher, Kohlmeyer, Matthews & Schumacher